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In The Supreme Court of The United States

OCTOBER TERM, 1970

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ELLER TELECASTING CO. OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

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The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, entered in this proceeding on December 4, 1970.

OPINION BELOW

The opinion of the Court of Appeal, reported in 13 Cal. App. 3d 296, 91 Cal. Rptr. 468 (1970) appears in Appendix A hereto. The California Supreme Court's denial of petitioner's Petition for Hearing on January 28, 1971, is reported in 3 Cal. 3d, Minutes, p. 4.

JURISDICTION

The judgment of the Court of Appeal was entered on December 4, 1970. The California Supreme Court, the highest state court in California, denied petitioner's Petition for Hearing on January 28, 1971. This petition is filed within 90 days of that date. Jurisdiction is conferred on this court by 28 U. S. C. section 1257(3).

QUESTION PRESENTED

Whether the application of a valid California statute, which prohibits advertising the price of eyeglasses, to an Arizona telecasting company televising such advertising to California viewers by means of a transmitter located in California imposes an unconstitutional burden on interstate commerce.

STATUTES INVOLVED

1. United States Constitution, Article I, Section 8, clause 3:

"The Congress shall have Power

". . . .

"To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

2. California Business and Professions Code, section 3129:

"It is unlawful to advertise at a stipulated price, or any variation of such a price, or as being free, any of the following:

"The examination or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses, or the frames or fittings thereof.

"The provisions of this section do not apply to the advertising of goggles, sun glasses, colored glasses or occupational eye-protective devices, provided the same are so made as not to have refractive values."

3. California Business and Professions Code, section 3131:

"In addition to other proceedings provided for in this chapter, whenever any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, an offense against this chapter, the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining such conduct on application of the board, the Attorney General, the district attorney of the county . . . ."

STATEMENT OF THE CASE

On or about April 29, 1968, petitioner filed a Complaint for Injunction against respondent in the Imperial County Superior Court, State of California. Said Complaint sought to enjoin respondent Eller Telecasting Co. of Arizona (hereinafter "respondent Eller Telecasting") from advertising the services and products of Mesa Optical Company at a stipulated price.

A stipulated Statement of Facts was filed, and is attached hereto as Appendix B. Said Statement of Facts established the following: that respondent Eller Telecasting transmits television programs and advertising to viewers in California; that said advertising originates in respondent's studios in Yuma, Arizona, and is transmitted by signal to respondent's transmitting tower on Black Mountain in Imperial County, California, for transmission to individual television sets in Imperial County, California, Yuma County, Arizona, and the Republic of Mexico; that included in said advertising so transmitted by respondent Eller Telecasting is the advertising of Mesa Optical Company, which includes the advertising of optometrical services and eye-protective devices at a fixed price.

In its Points and Authorities filed in the Imperial County Superior Court, petitioner relied upon the case of Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424 (1963). (Cl. Tr., p. 5.) Respondent Eller Telecasting filed a Memorandum In Opposition to Injunction, asserting that the Head case, supra, was not applicable, and that to apply California Business and Professions Code section 3129 to respondent Eller Telecasting would constitute an unconstitutuional burden upon interstate commerce. (Cl. Tr., pp. 23, 28-30, 32-33.)

The Imperial County Superior Court issued a Memorandum Opinion in which it cited the Head case, supra, as its authority to issue the injunction against respondent Eller Telecasting. (Cl. Tr., pp. 40-42.) Judgment was entered accordingly. (Cl. Tr., pp. 56-57.)

Respondent Eller Telecasting appealed to the California Court of Appeal, Fourth Appellate District, Division One. In its brief, respondent Eller Telecasting contended that the injunction constituted an undue burden on interstate commerce, and that the case of Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, was not controlling. (App. Op. Br., pp. 17, 20, 26-27.) On December 4, 1970, the California Court of Appeal agreed with respondent Eller Telecasting and reversed the judgment. (See Appendix A.)

On January 28, 1971, petitioner's Petition for Hearing was denied by the California Supreme Court, the highest state court in California.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS IN DIRECT CONFLICT WITH THIS COURT'S APPLICABLE DECISION IN HEAD V. NEW MEXICO BD. OF EXAM. IN OPTOMETRY

The judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, has decided a federal question of substance in a way not in accord with, and in fact directly contrary to, this Honorable Court's applicable decision in Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424 (1963).

In the Head case, supra, a New Mexico radio station and newspaper attempted to justify its violation of a state statute prohibiting advertising the price of eyeglasses on the grounds that application of the statute to said members of the local media would impose an unconstitutional burden on interstate commerce. This Court refused to allow such an argument to succeed.

In the instant case, the California Court of Appeal has allowed respondent Eller Telecasting to do exactly what this Court expressly refused to allow the radio station and newspaper in the Head case to do -- justify a violation of a state statute on the grounds that to require respondent Eller Telecasting to obey said statute would be to impose an unconstitutional burden on interstate commerce.

It is not disputed that respondent Eller Telecasting (1) has its transmitter located in California, and (2) uses

that transmitter to carry advertisements to California viewers, which advertisements are illegal under California law. Petitioner submits that respondent Eller Telecasting cannot hide behind the commerce clause of the United States Constitution in order to openly violate California law. This principle underlies the ruling by this Court in the Head case. For this reason alone, petitioner strongly believes that a writ of certiorari should issue.

In the Head case, this Court cited California Business and Professions Code section 3129 as an example of legitimate state legislation enacted to assure high standards of professional competence. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 426. The purpose of the price advertising prohibition contained in such legislation is to "protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 426.

This Court further stated in the Head case as follows:

> ". . . the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483." 374 U.S. 424, 428-429.

Should the respondent herein be allowed to transmit advertising to California viewers which is clearly illegal under California law, from a transmitter located in California itself, simply because respondent's television station is engaged in interstate commerce? Petitioner strongly contends that essentially local television advertising possesses no instant immunity from legitimate state regulations "directly addressed to protection of the public health." As this Court stated in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, in upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate commerce:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' " 362 U.S. 440, 443-444.

II

LOCAL TELEVISION ADVERTISING TRANSMITTED INTO CALIFORNIA BY MEANS OF A TRANSMITTER LOCATED IN CALIFORNIA POSSESSES NO INSTANT IMMUNITY FROM A LEGITIMATE CALIFORNIA STATUTE DIRECTLY ADDRESSED TO PROTECTION OF PUBLIC HEALTH.

The California Court of Appeal held that the action taken by the Imperial County Superior Court involves an "unwarranted extension" of this Court's ruling in Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424. While conceding that Head "presented a similar question for determination and was based upon New Mexico statutes much like the California laws under consideration," the California Court of Appeal determined that "the factual situation involved in this case and that presented in Head are as opposite as 'heads and tails.' " (See Appendix A, p. 8.)

Petitioner respectfully disagrees with the California Court's crucial determination that the factual situation involved in the instant case and that presented in the Head case are as opposite as "heads and tails." Petitioner respectfully contends that the factual situations involved in the two cases are so strikingly similar that the Imperial County Superior Court's judgment can only be characterized as necessary and proper in light of the ruling of this Court in the Head case.

In Head, a New Mexico radio station and newspaper were enjoined from accepting or publishing within the state advertising from an adjoining state (Texas) optometrist which quoted prices or terms for the sale

of eyeglasses. The injunction was issued pursuant to section 67-7-13 of the New Mexico Statutes Annotated which prohibits, among other things, advertising the price or terms of the sale of eyeglasses. The radio station in Head was close to the border of Texas, the adjoining state, and much of the area served by the radio station lay in Texas. This Honorable Court held that the New Mexico statute, as applied in that case to prevent the publication of the proscribed price advertising, did not impose a constitutionally prohibited burden on interstate commerce. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429.

In Head, this Court expressly rejected the argument that the New Mexico injunction would have the effect of preventing communication between the Texas optometrist and the residents of Texas. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429, n. 5.

The New Mexico statute involved in the Head case, like section 3131 of the California Business and Professions Code, was by its own wording made applicable to "any person" and was not restricted solely to optometrists. New Mexico Statutes Ann., section 67-7-13; Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429.

The only factual difference between the instant case and the Head case is that the radio station in Head was located in the state issuing the injunction (New Mexico), whereas respondent's television studio is located in Arizona. However, although respondent's studio is in Arizona, respondent's transmitter is located in Imperial County, California; the transmission from said transmitter is carried to viewers in Imperial County, California, as well as Yuma County, Arizona; respondent maintains a sales office in El Centro, California,

and employs one salesman in California; and respondent derives seven percent of its total revenue from local Imperial County advertisers.

The crucial point is that the prohibited advertising is transmitted to the California public from respondent's transmitter located in Imperial County, California.

In Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, this Court held as follows:

> "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." 362 U.S. 440, 448.

Using this criteria, this Court held in the Head case that application of the statute involved therein neither discriminated against interstate commerce, nor impinged upon an area of interstate commerce requiring uniformity of regulation. Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424, 429. Since there are no substantial distinctions between the facts in the Head case and the facts herein, said holding is equally applicable in the instant case.

CONCLUSION

The decision of the California Court of Appeal is in direct conflict with this Court's applicable decision in Head v. New Mexico Bd. of Exam. in Optometry, 374 U.S. 424.

Local television advertising transmitted into California by means of a transmitter located in California possesses no instant immunity from a legitimate California statute directly addressed to protection of public health.

A Writ of Certiorari should issue to review the Judgment and Opinion of the California Court of Appeal, Fourth Appellate District, Division One.

Respectfully submitted,

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